

DEPARTMENT OF STATE REVENUE

**Memorandum of Decision: 04-20170942R; 04-20170943R; 04-20170944R;
04-20170945R; 04-20170946R; 04-20170947R; 04-20170948R; 04-20170949R;
04-20170950R; 04-20170951R; 04-20170952R; 04-20170953R; 04-20170954R;
04-20170955R; 04-20170956R; 04-20170957R.**

**Gross Retail Tax
For the Years 2014, 2015, 2016, and 2017**

HOLDING

Restaurant Company was able to produce documentation and explanation establishing a higher exemption rate for utility usage than originally determined by the Department; however, Restaurant Company failed to establish that each of its restaurants was entitled to the 100 percent, "predominate use," exemption.

ISSUE**I. Gross Retail Tax - Predominant Use Utility Exemption.**

Authority: IC § 6-2.5-2-1; IC § 6-2.5-5-1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Aztec Partners, LLC v. Indiana Dep't of State Revenue*, 35 N.E.3d 320 (Ind. Tax Ct. 2015); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991); [45 IAC 2.2-4-13](#); [45 IAC 2.2-5-8\(d\)](#)

Taxpayer argues that the Department erred in determining the extent to which its restaurants were entitled to a sales tax exemption on the purchase of utilities directly used in the preparation of its food offerings.

STATEMENT OF FACTS

Taxpayer is an out-of-state company which operates Indiana restaurants. Taxpayer submitted a request for a refund of sales tax paid on the purchase of electricity consumed by its restaurants. The Indiana Department of Revenue ("Department") reviewed the information submitted by Taxpayer. The Department's representative conducted an on-site visit to a number of the restaurants claiming the refund.

The Department's review resulted in a determination that certain of the restaurants were entitled to a 100 percent exemption on the purchase of electric utilities. In other instances, the Department found that the restaurants were entitled to a partial - less than 100 percent - exemption.

The Department's decision resulted in a partial refund of the amount of sales tax originally requested. Taxpayer disagreed with the Department's decision arguing that all of its restaurants were entitled to both a 100 percent exemption and a refund of the entire amount of tax originally sought. Taxpayer submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest and submitted additional documentation intended to support its argument. This Memorandum of Decision results.

I. Gross Retail Tax - Predominant Use Utility Exemption.**DISCUSSION**

The issue is whether Taxpayer has submitted information sufficient to establish that it is eligible for an additional refund of sales tax because its restaurants are all entitled to a 100 percent exemption on the purchase of their electrical utilities.

Indiana sales tax is imposed pursuant to IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

An exemption from sales and use tax is provided for tangible personal property purchased for use in direct production of other tangible personal property. This exemption is found in IC § 6-2.5-5-5.1, which states:

(a) As used in this section, **"tangible personal property" includes electrical energy**, natural or artificial gas, water, steam, and steam heat.

(b) Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

(Emphasis added).

In the case of electrical usage, [45 IAC 2.2-4-13](#) explains:

(a) In general, the furnishing of electricity, gas, water, steam, or steam heating services by public utilities to consumer is subject to tax.

(b) The gross receipt of every person engaged as a power subsidiary or a public utility derived from selling electrical energy, gas, water, or steam to consumers for direct use in direct manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#) shall not constitute gross retail income of a retail merchant received from a retail transaction. Electrical energy, gas, water, or steam will only be considered directly used in direct production, manufacturing, mining, refining, oil or mineral extraction, irrigation, agriculture, or horticulture if the utilities would be exempt under [IC 6-2.5-5-5.1](#).

(c) Sales of public utility services or commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#), based on a single meter charge, flat rate charge, or other charge, are excepted if such services are separately metered or billed and will be used predominantly for the excepted purposes.

(d) Sales of public utility services and commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, or horticulture, based on a single meter charge, flat rate charge, or other charge, which will be used for both excepted and nonexcepted purposes are taxable unless such services and commodities are used predominantly for excepted purposes.

(e) Where public utility services are sold from a single meter and the services or commodities are utilized for both exempt and nonexempt uses, the entire gross receipts will be subject to tax unless the services or commodities are used predominantly for excepted purposes. Predominant use shall mean that more than fifty percent (50[percent]) of the utility services and commodities are consumed for excepted uses.

(Emphasis added).

Therefore, if 50 percent or more of electricity sold from a single meter is used in an exempt manner, the purchaser/taxpayer is considered to have predominantly used the electricity for exempt purposes and the electricity sold through that meter is wholly exempt from sales tax and use tax. In order to qualify for the exemption, a taxpayer must show that "1) it is engaged in production, 2) it has an integrated production process, and 3) the electricity is essential and integral to its integrated production process." *Aztec Partners, LLC v. Indiana Dep't of State Revenue*, 35 N.E.3d 320, 324 (Ind. Tax Ct. 2015).

IC § 6-2.5-5-5.1, like all tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law

contained within this decision, as well as the preceding decision denying a portion of the requested refund, are entitled to deference.

Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

Taxpayer raises a series of four arguments intended to buttress its argument that all of its restaurants are entitled to a "predominate usage" (100 percent) exemption on their purchases of electric utilities.

- Taxpayer states that it can provide documentary evidence establishing that electrical appliances in its restaurants consume more electricity than the amount previously determined. In other words, Taxpayer states that the "equipment rating" of its electrical appliances requires an upward adjustment.
- Taxpayer argues that the Department overlooked the electricity consumed by its "Cayenne Hot Food Appliances" because the Department never considered these devices and never considered the electricity consumed by the devices.
- Taxpayer argues that the Department failed to consider that its restaurants - besides providing food service to its on-site customers - also provides off-site catering services. According to Taxpayer, if the additional electrical consumed in preparing catered food were considered, the amount of each restaurants' "load factor" would increase.
- Taxpayer argues that - cumulatively - the various adjustment cited above warrant a determination that all of Taxpayer's restaurants are entitled to the predominate (100 percent) exemption.

A. Equipment Rating.

Taxpayer has provided product specification sheets for the electrical devices used in its restaurants. According to Taxpayer, the specification sheets clearly show that the amperage and voltage ratings establish that the electrical consumption of the devices the Department agreed were involved in "direct production" of its food products is greater than the amount the Department previously calculated.

In this case the analysis is straightforward. Taxpayer has presented source documentation consisting of the electrical devices' original specification sheets. The Department's Enforcement Division is requested to review the specification sheets and make whatever adjustments to its original equipment rating calculations that are warranted.

B. "Cayenne Hot Food Appliances."

Taxpayer operates "Cayenne Hot Food Appliances" at its restaurant locations. The devices consume electricity. Taxpayer states that these appliances consume electricity in a manner which qualifies for the exemption. One of the appliances' vendors describes the function of the devices as follows:

Merchandisers are ideal for rethermalizing chilled food or holding heated food. *Ammazon.com.*, https://www.foodservicedirect.com/product.cfm/p/2954717/Cayenne_Model_HS_Ultra_Full_Size_Rethermalizer_Food_Warmer.htm. (Last visited November 21, 2017).

Another of the appliances' vendors describes the devices as follows:

For caterers and those who work in high-volume cafeterias or restaurants, having plenty of food available to serve to customers can cut down on service times or back-ups in the buffet line. The trick is to be able to heat and keep those foods warm and appetizing prior to being plated. *Restaurant Supply.Com.*, <https://www.restaurantsupply.com/vollrath-72023-HS-ultra-cayenne-full-size-heat-n-serve-rethermalizer/>. (Last visited November 21, 2017).

The common thread in any description of the device is that the appliance is categorized as a "rethermalizer."

A rethermalizer is a heavy cooking appliance that works to heat up pre-packed foods from a chilled or frozen state (below 40°F) to a temperature above 165°F, in about 90 minutes. It is also capable of holding the

temperature of food at 150°F, until ready to serve. *Tundra Restaurant Supply*, <http://blog.etundra.com/get-equipped/rethermalizer>. (Last visited November 21, 2017).

As with any of the "production" exemptions such as that provided under IC § 6-2.5-5-5.1, proper application of that exemption requires determining at what point "production" begins and at what point "production" ends. [45 IAC 2.2-5-8\(d\)](#) states:

Pre-production and post-production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.

The Cayenne Hot Food Appliances perform two functions; the devices maintain prepared food at an appropriate temperature which is a "post-production" function which does not qualify for the sought after exemption. To the extent to which these appliances perform this post-production function, the electricity consumed in the operation of the appliances does not qualify for the sales tax exemption provided under [45 IAC 2.2-4-13](#).

However, the available information also establishes that the appliances prepare pre-packaged foods in a process which has a direct effect on those foods. To the extent that the Cayenne Hot Food Appliances are used to "alter[] the [food] to its completed form," the electricity consumed in the operation of the appliances qualifies for the sales tax exemption provided under [45 IAC 2.2-4-13](#). See *Aztec*, 35 N.E.3d at 324.

Based on the information provided by Taxpayer, the Department's Enforcement Division is requested to review the information provided and to make whatever adjustment that is warranted.

C. Catering Activities.

Taxpayer points out that its restaurants engage in selling prepared food to its on-site customers but that it periodically also provides catering services for off-site customers. According to Taxpayer, "catering makes up about 7.5[percent] of total sales on average." According to Taxpayer, the catering process requires additional electrical utility usage and that if this "additional" usage is considered, its restaurants will readily achieve the 100 percent predominate usage threshold. Taxpayer therefore requests that the Department grant each of its restaurants the predominate use exemption.

The Department is unable to agree; although Taxpayer has provided statistics purporting to establish the degree to which certain of its restaurants engage in providing catering services, the information is - at best - speculative. How, specifically, do the catering activities alter the Department's earlier findings? Although the Department has no reason to disagree that a number of its restaurants do in fact provide catering services, there is nothing which provides a specific, quantifiable means by which the Department can measure additional electrical consumption over-and-above those amounts already considered.

D. Predominate Use.

Nonetheless, Taxpayer suggests that the Department take a "holistic" approach to its information and grant its restaurants an across-the-board 100 percent predominate usage exemption. Taxpayer maintains that between the equipment rating adjustments, the use of the "rethermalizer" appliances, and the restaurants' catering activities, each restaurant exceeds the 50 percent "predominate use" threshold.

The Department must respectfully decline Taxpayer's invitation to grant a wholesale 100 percent exemption. As noted above Taxpayer exemptions are "strictly construed against exemption from [] tax." *Tri-States Double Cola Bottling Co.*, 706 N.E.2d at 283. Simply stated, in determining the extent to which Taxpayer's restaurants are entitled to the exemption, "the numbers are what the numbers are." The decision driving any decision to grant a refund or determining the extent to which a taxpayer is entitled to an exemption is driven strictly by the reliable, substantive, quantifiable information provided by that taxpayer.

Taxpayer's protest is sustained in part and denied in part. The Department's Enforcement Division is requested to review the additional "specification sheets" the electric consumption of the rethermalizers and to make whatever adjustment to the amount of electrical consumption as required. In all other respects, Taxpayer's protest is denied.

FINDING

Subject to review by the Department's Enforcement Division, Taxpayer's protest is sustained in part and denied in part.

Posted: 02/28/2018 by Legislative Services Agency

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